

Early termination charges – big for Telco and IT

Speed read

A new pro-supplier judgment in Australia is great for incumbent B2B and B2C providers, but not so flash for customers, and for suppliers trying to churn the customer away. Will it stick though?

Early termination charge clauses (ETCs) are major issues in IT and Telco:

- For businesses wanting to move from one or more providers to another, ETCs can effectively stymie that transition for some time.



This is especially hard when there are multiple differing termination dates with various providers, and the business wants to, say, move to a single platform (e.g. unified comms or outsourcing). We've outlined some of the issues in our article, [Minimise early termination charges on switching ICT suppliers: a case study](#).

- For internet and phone contracts (a classic example being a mobile service with a supplied handset), ETCs can lock in customers from churning away to other suppliers.

Depending on your perspective (existing supplier, wannabe supplier, customer or economist), these barriers to churn can be a good thing or a bad thing.

New legal decisions are emerging under which ETCs can end up being unenforceable, under an extension of the long standing law as to liquidated damages for breach of contract (LDs): see our articles, [Early Termination Charges – Enforceable?](#) and [Early termination charges – major developments \(and for the penalties regime\)](#).

Last month, a new chapter of the ETC playbook was written in Australia: an appeal judgment in the bank charges litigation: *Paciocco v ANZ Bank*.¹

And, if it sticks and survives an appeal to the High Court (and if it's applied in New Zealand), ETCs will be a lot less risky for ICT providers. The case shows that care is still needed, and that there is some magic in the drafting of the clauses.

May 2015

The Detail

The starting point in the thinking is that, where there is an LD for a breach of contract, it is only enforceable if it is a "genuine pre-estimate of damage". As we've pointed out, the new law applies that to scenarios which do not involve a breach of contract, of which an ETC is a great

example (as the ETC gives a right to the customer to terminate for a fee, rather than early termination being a breach).

For those relying on ETC regimes to help lock in customers, the good news is that, in figuring out what charges are enforceable, we can say from what the court said that:

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- It's a forward looking assessment when the ETC was agreed.
- It's for the party opposing the ETC to prove the case (and that can be mighty difficult).
- When assessing the legality of the charge, broadly one looks to whether it is extravagant, exorbitant or unconscionable: these are words that reflect an assessment at the upper end of what is unreasonable. Not only that, but this may be assessed against the benchmark of the greatest loss that might be suffered by the supplier, due to non-compliance with the contract.
- You can dig deep into the costs incurred by the supplier, and the commercial impact on it, in order to show that the ETC is supportable. For example, as to bank charges in the class action, a wide range of costs were included, such as accounting provisions taken up in the company's financial books for the risk of breach, and the additional costs of capital (including, in the case of banks, regulatory capital), resulting from the risk of breach by defaulting customers.

- Some charges won't actually come under the regime anyway.

But this is just a chapter in a book still being written. There may be an appeal, further refinement in later cases, and there's also the question of what our courts will do about this. Plus, there are other developments, such as a forthcoming appeal to the UK Supreme Court in *Makedessi v Cavendish*,² and even this week has seen a significant English Court of Appeal decision in this area: *ParkingEye Ltd v Beavis*.³

For domestic consumers, suppliers have an additional hurdle from 17 March 2015: the unfair contract terms regime in the Fair Trading Act. See, for example, our article [Unfair contract terms regime starts 17 March: a summary of key issues](#).

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1. [2015] FCAFC 50.
 2. [2013] EWCA Civ 1539.
 3. [2015] EWCA Civ 402.

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